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Mitsuho Electronics Sdn Bhd v Allswell Packagings Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)(W)-1476–06 OF 2013

B

ALIZATUL KHAIR, ABDUL AZIZ AB RAHIM AND VARGHESE GEORGE JJCA

8 JULY 2014

C

Tort — Conversion — Damages — Measure of damages — Defendant purchasing building occupied by plaintiff — Defendant committing tort of conversion in wrongfully detaining and selling plaintiff's goods stored in building — Whether damages to be assessed based upon market value of goods at time of conversion

D

The first defendant had purchased at a public auction a factory building that had been occupied by the plaintiff for their business and wherein the plaintiff's goods were located. The first defendant took physical possession of the premises pursuant to writ of possession. The plaintiff commenced this action for damages allegedly caused by trespass and/or conversion of the plaintiff's goods and property at the premises. The court found that although there was no trespass committed by the first defendant, the first defendant had however committed the tort of conversion when they wrongfully detained and subsequently sold the plaintiff's goods or belongings. Hence, the court ordered that the first defendant was to pay the plaintiff general damages to be assessed by the deputy registrar ('the DR'). The DR then assessed damages at RM1,835,000. Upon appeal by the first defendant, the judge ordered the DR to re-assess damages. The DR then re-assessed damages at RM1,220,000. Upon further appeal by the plaintiff, the judge increased the damages to RM1,905,650. The first defendant appealed against the judge's assessment of the damages.

E

F

G

Held, allowing the appeal in part with no order as to costs:

H

(1) The damages to be allowed in respect of the plaintiff's belongings/goods that had been converted would be the market value of those items as at the time of the conversion. Similarly in respect of other losses incurred, it had to be assessed too as at the same date. If there was no sufficient evidence to establish such value or loss, the plaintiff would only be entitled to recover nominal damages (see para 13).

I

(2) The plaintiff's claim of RM595,000 for machinery P2, P3 and P4 was premised wholly on three invoices issued at the time of the purchase of the machinery, that was, some six months before the date of taking of possession of the premises. It was neither logical nor reasonable to

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conclude that the machinery P2, P3 and P4, had in a space of six months or so, (howsoever extensively used) depreciated in market value from about RM595,000 to the realised sum of RM80,000 upon subsequent sale (see paras 16 & 32).

(3) In respect of machinery P10, P11, P12 and P13, the plaintiff's evidence that was relied upon to provide an indicative value of loss were invoices showing an alleged purchase value of RM2,947,200 in all. The approach to award approximately only 50% of the available evidence of the relevant purchase consideration for the goods or equipment, was consistent with the approach which had found favour with the Court of Appeal in *Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675. Further, the first defendant did not offer any evidence which seriously countered or contradicted the indication of the purchase consideration claimed to have been paid for those items of machinery/assets as borne out by the invoices tendered by the plaintiff. Hence, such evidence remained a reliable base to work from to derive the quantum of damages to be awarded in respect of the machinery/equipment (see paras 20, 23 & 32).

(4) As regards 'loss of business' and 'loss of raw materials' allowed by the learned judge, there was no basis or evidence for the learned judge to order these additional damages (see para 34).

[Bahasa Malaysia summary

Defendan pertama telah membeli di lelongan awam bangunan kilang yang telah diduduki oleh plaintif untuk perniagaan mereka yang mana barang-barang plaintif ditempatkan. Defendan pertama mengambil milikan fizikal premis-premis berikutan writ milikan. Plaintif memulakan tindakan ini untuk ganti rugi yang didakwa disebabkan oleh pencerobohan dan/atau pertukaran barang-barang plaintif dan harta benda di premis-premis tersebut. Mahkamah mendapati bahawa walaupun tidak terdapat pencerobohan yang dilakukan oleh defendan pertama, defendan pertama walau bagaimanapun telah melakukan tort penukaran apabila mereka secara salah menahan dan kemudiannya menjual barang-barang dan milikan plaintif. Maka, mahkamah memerintahkan bahawa defendan pertama membayar kepada plaintif ganti rugi am untuk ditaksirkan oleh timbalan pendaftar ('TP'). TP kemudiannya menaksir ganti rugi pada RM1,835,000. Atas rayuan oleh defendan pertama, hakim memerintahkan TP untuk menaksir semula ganti rugi. TP kemudiannya menaksir semula ganti rugi pada RM1,220,000. Atas rayuan selanjutnya oleh plaintif, hakim menambah ganti rugi kepada RM1,905,650. Defendan pertama merayu terhadap penaksiran hakim terhadap ganti rugi.

Diputuskan, membenarkan sebahagian rayuan tanpa perintah terhadap kos:

(1) Ganti rugi dibenarkan berkaitan milikan/barang-barang plaintif yang

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telah ditukarkan adalah nilai pasaran barang-barang tersebut pada masa penukaran tersebut. Sama juga berkaitan kerugian lain yang ditanggung, ia juga mesti ditaksirkan pada tarikh yang sama. Jika tidak terdapat keterangan yang mencukupi untuk membuktikan nilai atau kerugian sedemikian, plaintif hanya berhak untuk mendapat semula ganti rugi nominal (lihat perenggan 13).

(2) Tuntutan plaintif sebanyak RM595,000 untuk mesin P2, P3 dan P4 adalah berdasarkan keseluruhannya atas tiga invois yang dikeluarkan pada masa pembelian mesin tersebut, iaitu, enam bulan sebelum tarikh mengambil milikan premis-premis tersebut. Ia tidak logik atau munasabah untuk menyimpulkan bahawa mesin P2, P3 dan P4, dalam masa enam bulan atau lebih (bagaimana digunakan secara banyak sekali pun) susut nilai dalam nilai pasaran dari lebih kurang RM595,000 kepada jumlah yang direalisasikan sebanyak RM80,000 semasa jualan berikutnya (lihat perenggan 16 & 32).

(3) Berkaitan mesin P10, P11, P12 dan P13, keterangan plaintif yang digunakan untuk memberikan nilai kerugian indikatif adalah invois-invois yang menunjukkan nilai pembelian yang didakwa sebanyak RM2,947,200 keseluruhannya. Pendekatan untuk mengawardkan lebih kurang hanya 50% daripada keterangan yang ada mengenai pertimbangan pembelian relevan untuk barang-barang atau kelengkapan, adalah konsisten dengan pendekatan yang ditemui oleh Mahkamah Rayuan dalam kes *Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675. Selanjutnya, defendan pertama tidak menawarkan apa-apa keterangan yang secara serius menentang atau menyangkal indikasi pertimbangan pembelian yang didakwa telah dibayar untuk barang-barang mesin/aset tersebut seperti ditunjukkan oleh invois-invois yang diserahkan oleh plaintif. Maka, keterangan sedemikian kekal sebagai asas yang boleh dipercayai bagi mengira untuk mendapatkan kuantum ganti rugi untuk diawardkan berkaitan mesin/kelengkapan (lihat perenggan 20, 23 & 32).

(4) Berkaitan 'loss of business' dan 'loss of raw materials' yang dibenarkan oleh hakim yang bijaksana, tidak terdapat asas atau keterangan untuk hakim bijaksana untuk memerintahkan ganti rugi tambahan ini (lihat perenggan 34).]

Notes

For cases on damages, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 139–142.

Cases referred to

BBMB Finance (Hong Kong) Ltd v EDA Holdings Ltd [1990] 1 WLR 409, PC (refd)

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A *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 3 SLR 502, CA (refd)
Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675, CA (folld)

B **Appeal from:** Civil Suit NCvC No 23–9 of 2010 (High Court, Johor Bahru)

Porres Royan (Ang Boon Heng with him) (Ang & Co) for the appellant.
S Jeyakumar (Roy & Assoc) for the respondent.

C **Varghese George JCA:**

INTRODUCTION

[1] The learned deputy registrar of court, had (at the conclusion of the full trial of the matter) been directed to make an assessment of the damages recoverable by the plaintiff. On 18 March 2013 the learned deputy registrar issued her final order thereto. Upon appeal against that order, the learned judge in chambers on 31 May 2013 varied the sums that had been assessed and ordered by the learned deputy registrar.

E This appeal before us was brought by the first defendant in the suit against the said decision of the learned judge of the 31 May 2013.

[2] After having considered the submissions of respective counsel, we had allowed in part the appeal before us.

[3] In this grounds, the parties will be referred to as they were in the principal suit.

G BACKGROUND

[4] The first defendant had purchased at a public auction a factory building that had been occupied by the plaintiff for their business and wherein the plaintiff's goods were located.

[5] The first defendant had been compelled to obtain a writ of possession from the court before the first defendant could take physical possession of the premises on 12 May 2010.

[6] The plaintiff had commenced this action in 2010 for damages allegedly caused by trespass and/or conversion of the plaintiff's goods and property at the premises. After a full trial, the court had on 25 May 2011 held that:

(a) there was no tort of trespass committed by the first defendant;

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(b) the plaintiff was in occupation of the premises when the writ of possession was executed on 12 May 2010;

(c) the first defendant had prevented the plaintiff from removing the plaintiff's belongings at the premises;

(d) the first defendant had however committed the tort of conversion when they wrongfully detained and subsequently sold the plaintiff's goods or belongings; and

(e) the first defendant was to pay the plaintiff general damages to be assessed by the deputy registrar of the court.

[7] Following from that judgment, damages was initially assessed by the deputy registrar and ordered on 1 February 2012 as follows:

(i)	Solvent (raw material)	RM5,000
(ii)	Machinery (as per exhs P2, P3 and P4)	RM300,000
(iii)	Machinery (as per exhs P10, P11, P12 and P13)	RM1,500,000
(iv)	4 dogs	RM20,000
(v)	Files and other items	RM10,000
		RM1,835,000

('the first DR's assessment').

[8] The first defendant being aggrieved that they had not been allowed to call witnesses at that assessment stage, appealed to the learned judge. The court on 27 July 2012 ordered the deputy registrar to rehear the assessment and to allow the first defendant to call their witnesses at that continued proceedings.

[9] On 18 March 2013 the learned deputy registrar completed the assessment, as reordered by the learned judge, and went on to make the following awards of damages:

(i)	Solvent	RM5,000
(ii)	Machinery (as per exhs P2, P3 and P4)	RM200,000
(iii)	Machinery (as per exhs P10, P11, P12 and P13)	RM1,000,000
(iv)	4 dogs	RM10,000
(v)	Files and other items	RM5,000
		RM1,220,000

[10] Both the parties appealed against this decision of the learned deputy registrar to the learned judge of the court. On 31 May 2013, the learned judge

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dismissed the first defendant's appeal and allowed the plaintiff's appeal. The order as to damages was varied by the learned judge and the following were the substituted orders made by the court:

(i)	Solvent	RM5,000
(ii)	Machinery (as per exhs P2, P3 and P4)	RM300,000
(iii)	Machinery (as per exhs P10, P11, P12 and P13)	RM1,500,000
(iv)	4 dogs	RM200
(v)	Claim in Bundle A (*)	RM50,450
(vi)	Loss of Business (*)	RM50,000
		RM1,905,650

(*additional items).

[11] The first defendant appealed against this order of 31 May 2013 of the learned judge. There was however no cross-appeal by the plaintiff against the learned judge's reduction of damages in respect of the '4 dogs' and the reversal/cancellation of the award of RM5,000 as damages for 'files and other items'.

BEFORE US

[12] The first defendant confined their appeal against the order of the learned judge (31 May 2013) in respect of the following items only:

(a) item (ii) and (iii), namely damages ordered in respect of 'Loss of Machinery';

(b) item (v), the award of the Appendix A losses, basically supplies allegedly delivered to the plaintiff on 10 May 2010, ie before the taking of possession of the premises on 12 May 2010; and

(c) item (vi), 'loss of business'.

MATERIAL DATE

[13] It was not in dispute that the damages to be allowed in respect of the plaintiff's belongings/goods that had been converted would be the market value of those items *as at the time of the conversion*. Similarly in respect of other losses incurred, it had to be assessed too as at the same date, and in all cases, evidence had to be led to establish the measure of compensation to be awarded. It was also accepted that if there was no sufficient evidence to establish such value or loss, the party entitled to damages (the plaintiff in this case) would only be entitled to recover nominal damages.

[14] Authority for the aforestated position was found in *BBMB Finance*

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(Hong Kong) Ltd v EDA Holdings Ltd [1990] 1 WLR 409, where the Privy Council had opined and affirmed that the general rule was that where property was irreversibly converted the measure of damages for conversion was the value of the property at the date of conversion.

[15] The Singapore Court of Appeal in *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 3 SLR 502, in dealing with the issue of assessment of damages, particularly in conversion claims in tort, had also restated the principles applicable in the following terms:

> The general principle in the quantification of tortious damages is *restitutio in integrum*: the plaintiff is entitled to recover the amount which will put him in the position he would have been in had the tort never been committed ...
>
> The fundamental rule in the assessment of damages is that the plaintiff cannot recover more than the loss actually sustained by him. Any actual loss which the plaintiff claims to have suffered must be proved. The measure of damages in conversion is the value of the goods, together with any consequential damage flowing from the conversion which is not too remote to be recoverable in law. The value of the goods is usually taken as at the time of conversion ... (Emphasis added.)

MACHINERY P2, P3, P4

[16] The plaintiff's claim under this item (ii) claim was in the total sum of RM595,000 and this was premised wholly on three invoices (all dated 30 November 2009) issued at the time of the purchase of the machinery, that is, some six months before the date of taking of possession of the premises.

[17] It was countered for the first defendant that the evidence of the price paid at the time of purchase was not sufficient to fix the value of the concerned machinery at the time of conversion. Counsel for the first defendant referred in particular to the testimony of the plaintiff's own witnesses, SP4 (at p 236 of *rekod rayuan Jld* 2(1)) to the effect that those machines had, subsequent to its purchase, been used continuously ('... 24 hours a day. Day shift and Night Shift. We cannot stop the machine ...'). The first defendant's position was that it was incumbent upon the plaintiff to adduce some independent and more credible evidence of value as at date of conversion, perhaps through a valuer, if this item of claim was to be allowed by the court.

[18] In the light of this admitted heavy usage of the machines from the time it was purchased, it was the first defendant's further argument that the court should accept as the best evidence of value, that is, *at the date of conversion*, the sum realised upon the subsequent sale of the machinery by the first defendant, namely the sum of RM80,000 as testified to by DW2 (the purchaser of the subject machinery) during the course of the trial proper. This, it was contended, was the best evidence available in the circumstances.

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[19] It ought to be noted here that as against the plaintiff's claim of RM595,000 for this item of claim, *the first DR's assessment* was for a sum of RM300,000 and in the subsequent assessment by the same learned deputy registrar, this sum had been reduced to RM200,000. The learned judge (against whose decision this appeal was brought) had however reinstated the learned deputy registrar's assessment of RM300,000. The reason given for this interference by the learned judge was that the learned deputy registrar had failed to state the basis or justification for the reduction from the original sum awarded of RM300,000 to RM200,000.

MACHINERY P10, P11, P12 AND P13

[20] In respect of the above machinery, the plaintiff's evidence that was relied upon to provide an indicative value of loss was similarly invoices, three of which were dated 2 August 2009, and one other dated 5 December 2009, amounting to an alleged purchase value of RM2,947,200 in all.

The first defendant's complaint was that the support for the plaintiff's claim here was also only 'invoices' and that no other independent valuation or assessment as to the value of machinery as at the date of conversion had been tendered at all by the plaintiff.

[21] In this case, the learned deputy registrar in the *first DR's assessment* had initially awarded RM1,500,000 but after the rehearing reduced that amount to RM1,000,000.

The learned judge (against whose decision this appeal was being brought), reverted the award of damages under this head to RM1,500,000 as originally ruled in the *first DR's assessment*.

[22] In the absence of any direct evidence as regards market value of the machinery *as at the time of conversion*, both the learned deputy registrar and the learned judge had, as it appeared to us, nevertheless settled for a value of damages at about *50%* of the invoiced purchase consideration paid for the machinery both in the case of P2, P3 and P4 as well as in respect of P10, P11, P12 and P13. This approach was confirmed by the learned judge in his written grounds with respect to the latter set of machinery in the following words:

> ... Jumlah RM1,500,000 ini sebenarnya merupakan 50% daripada nilai invois-invois berkenaan oleh itu ianya adalah munasabah dan berpatutan.

[23] In our view this approach to award approximately only 50% of the available evidence of the relevant purchase consideration for the goods or equipment, was consistent with the approach which had found favour with the Court of Appeal in *Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675.

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That was a case where general damages had been similarly ordered to be assessed. There the receipts for the goods (upon purchase) had been misplaced or lost but there was no dispute as to the existence/number of goods that formed the subject matter of the claim. A valuation report had also been tendered to court but that only provided an 'estimated value' of the goods and the learned trial judge there was disinclined to accept such an opinion.

[24] Nonetheless, as noted by the Court of Appeal there, the assessing court was required in any event to '… place a value on the missing goods'. In that case, the learned trial judge, in the result as against a claim of RM800,000, allowed a sum of RM400,000 as general damages. The Court of Appeal did not interfere with this approach and held that there was no error on principle committed in that assessment; the damages ordered by the trial court was upheld by the appellate court.

LOSS OF BUSINESS

[25] The learned deputy registrar had made no assessment or award in regard to this item of claim. The learned judge had however allowed a sum of RM50,000 under this head.

[26] The first defendant contended that there was no evidence whatsoever that had been adduced to support this claim, and in principle, the conversion of goods could not perse result in 'loss of business' unless 'causation' for that was first established on evidence. Here it was argued that this essential element had not been satisfied in any event.

LOSS OF SUPPLIES DELIVERED ON 10 MAY 2010

[27] Similarly as in the case of 'loss of business', the learned deputy registrar had not awarded any damages under this item of claim. Nonetheless the learned judge allowed this further damages in the sum of RM50,450.

[28] It was the plaintiff's contention that the previous solicitors for the first defendant had agreed to allow this item. We were however not shown anything on the records or in the notes of proceedings which indicated that this item or the alleged quantum had been agreed to previously by the first defendant or their solicitors earlier on record.

[29] The only material referred to by the plaintiff in this respect was a bare statement in the witness statement of their own witness, PW5, that there was raw material in the premises when it was sealed on 12 May 2010. Further what was available was a mere list of certain alleged suppliers (five in number) at p 65

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rekod rayuan Jld 1 (Bah A)(and repeated at p 313 *rekod rayuan Jld* 2(2) (Bah B and C)).

No evidence as to the alleged 'delivery' nor any documentary evidence to verify or confirm the existence of the raw material at the premises had been placed before the learned deputy registrar tasked with the assessment of damages in this case.

OUR OPINION

[30] We had considered the rather brief *alasan penghakiman* of the learned judge in the matter.

In respect of the award of damages for *loss of machinery*, the only discernable ground cited by the learned judge for reinstating the original amounts ordered in the *first DR's assessment*, as noted by us earlier, was the *failure of the learned registrar to give reasons why the award of damages had been reduced* to RM200,000 and RM1,000,000 from the originally assessed amount of RM300,000 and RM1,500,000 respectively.

[31] Be that as it may, the learned deputy registrar in her written grounds for her reassessment decision of 18 March 2013 had reasoned as follows:

> 1) Mesin-mesin, kelengkapan, jentera, perabot pejabat mempunyai susut nilai dalam jangka masa tertentu. Walaupun plaintif tidak mengemukakan laporan penilaian atau pun memanggil saksi untuk memberikan keterangan berkenaan nilai mesin dan kelengkapan tersebut, Mahkamah mengawadkan jumlah tersebut berdasarkan tempoh ia dimiliki serta digunakan yang pada pendapat mahkamah merupakan nilai yang munasabah. Tambahan pula, defendan pertama tidak mempertikaikan jumlah atau kuantiti mesin yang hilang cuma mempertikaikan nilai yang diawadkan sahaja ...

This reasoning appeared not to have been taken into account by the learned judge. It must be emphasised that the learned deputy registrar's second assessment had been carried out upon being ordered by the judge in chambers on 27 February 2012 to do a reassessment albeit in a more complete and comprehensive manner.

[32] On the other side of the scale, with respect to the first defendant's contention that the award of damages should be based on the realised value upon sale of P2, P3 and P4, we found it neither logical nor reasonable to conclude that the machinery in question, P2, P3 and P4, had in a space of six months or so, (howsoever extensively used) depreciated in market value from about RM595,000 to the realised sum of RM80,000 upon subsequent sale.

With respect to P10, P11, P12 and P13, the first defendant did not offer any evidence which seriously countered or contradicted the indication of the purchase consideration claimed to have been paid for those items of

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machinery/assets as borne out by the invoices tendered by the plaintiff. In those circumstances such evidence remained a reliable base to work from to derive the quantum of damages to be awarded in respect of the machinery/equipment.

[33] We were therefore of the considered view that the assessment of damages in respect of the 'loss of machinery' should not have been interfered with and left as determined and ordered by the learned deputy registrar on 18 March 2013.

[34] As regards the additional items of 'loss of business' and 'loss of raw materials' allowed by the learned judge, we however agreed with the first defendant that there was no basis or evidence for the learned judge to order these additional damages.

The written grounds furnished by the learned judge did not firstly, identify the specific evidence which formed the basis for allowing these claims, and secondly, did not address at all the issue of evidential burden that was upon the plaintiff to prove (and whether it had been discharged) to succeed on these claims, if at all.

[35] In the result we were of the unanimous view that the learned judge's order of 31 May 2013, in all fairness to the first defendant, ought to be varied to the extent and substituted as set-out below:

(a)	Solvent	– RM5,000
(b)	P2, P3 & P4	– RM200,000
(c)	P10, P11, P12 & P13	– RM1,000,000
(d)	Loss of dogs	– RM200
(e)	Loss of raw materials	– Nil
(f)	Loss of business	– Nil
(g)	Interest on the damage five above at the rate of 8%pa from 21 October 2010 until full settlement	
(h)	Costs at High Court (inclusive of assessment proceedings).	– RM60,000

[36] We also ordered each party to bear their own costs in respect of this appeal. The deposit was ordered to be refunded to the first defendant.

Appeal allowed in part with no order as to costs.

Reported by Kanesh Sundrum